

JUN 20 2003

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CATHY A. CATTERSON
U.S. COURT OF APPEALS

ALBERT LUEVANOS,

Petitioner - Appellant,

v.

JOSEPH MCGRATH,

Respondent - Appellee.

No. 02-16622

D.C. No. CV-01-04175-CRB

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Argued and Submitted June 9, 2003
San Francisco, California

Before: GRABER, WARDLAW, and BYBEE, Circuit Judges.

Petitioner Albert Luevanos appeals the denial of his habeas petition, 28
U.S.C. § 2254, following his conviction for involuntary manslaughter, Cal. Penal
Code § 192(b). We affirm.

* This disposition is not appropriate for publication and may not be cited to or by
the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

1. Prosecutor's Argument.

The first contention on appeal is that the prosecutor unconstitutionally commented on Petitioner's decision not to testify during his trial. The California Court of Appeal considered this argument on the merits and, in doing so, applied Griffin v. California, 380 U.S. 609 (1965).¹ The state appellate court reasoned that the jury would not necessarily have understood the prosecutor's statements to be a comment on Petitioner's failure to testify, as distinct from a comment on the state of the evidence as a whole. See United States v. Lopez-Alvarez, 970 F.2d 583, 595-96 (9th Cir. 1992) (holding that a prosecutor may comment on the failure of the defense to present exculpatory evidence, so long as the comment is not phrased to call attention to the defendant's failure personally to testify).

On de novo review of the district court's decision to dismiss the habeas petition, Miles v. Prunty, 187 F.3d 1104, 1105 (9th Cir. 1999), we conclude that the state court's decision was not based on an unreasonable determination of the facts and that the state court's decision did not involve an unreasonable application of Griffin. See 28 U.S.C. § 2254(d) (prescribing standard).

¹ The California Supreme Court denied review summarily.

2. Counsel's Effectiveness.

The second contention on appeal is that trial counsel provided ineffective assistance and, in particular, failed to request an alternative instruction on assault. The California Court of Appeal rejected this argument on the ground that, given the evidence, Petitioner was not entitled to the alternative instruction as a matter of state law. See People v. Stanfield, 38 Cal. Rptr. 2d 328, 335 (Ct. App. 1995) (discussing "conditional threat").

That decision was not based on an unreasonable determination of the facts in light of the evidence at trial and, therefore, we may not grant the petition. 28 U.S.C. § 2254(d). Because counsel's failure to request the instruction could not have prejudiced Petitioner, in that he was not entitled to the instruction under state law, it follows that the state court did not apply Strickland v. Washington, 466 U.S. 668 (1984), unreasonably.

AFFIRMED.